No. 4 . . 7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

GEORGE WOJCIK,

Petitioner,

vs.

BURTON PALMER, Trial Assistant, Municipal Court of Chicago, CASIMIR CWIKLINSKI, Supervising Judge of Traffic Court, Municipal Court of Chicago, AUGUSTINE BOAVE, Chief Justice, Municipal Court of Chicago, JOHN MELANIPHY, Corporation Counsel, City of Chicago, and CITY OF CHICAGO, a Municipal Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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No.

GEORGE WOJCIK, *Petitioner,*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on June 13, 1963.

OPINION BELOW.

The opinion of the Court of Appeals, printed in Appendix B, *infra*, is reported in 318 F. 2d 171. There was no opinion in the United States District Court.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 13, 1963. It is printed in Appendix C, *infra*. The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Petitioner, in an action under the Civil Rights Act, Title 42 U.S.C. #1983, invoking jurisdiction under Title 28 U.S.C. 1343 (3), is to be denied the right to have an adjudication on the merits in a case brought to declare his rights to be tried, in a state court ordinance prosecution, under criminal rules of procedure rather than civil rules of procedure.

2. Where the necessary operation of state court legal machinery will not accord Petitioner a fair trial in an ordinance prosecution, as a result of civil procedure, does the District Court have jurisdiction in a Civil Rights Act action to give Petitioner a remedy?

3. Does a District Court have power to dismiss a cause of action asserted under the Civil Rights Act "for lack of jurisdiction", on defendants' motions to strike the Amended Complaint without findings of any kind, without a memorandum or opinion setting forth its basis for such a dismissal?

4. Is a dismissal of a Civil Rights Act cause of action "for lack of jurisdiction" a proper order, without a further order dismissing the cause of action and entering judgment on the merits?

5. Whether Title 28 U.S.C. 2283 is an independent ground for dismissing a civil rights case, where relief is sought on a state court proceeding, regardless of the aim, purpose or effect of such relief.

6. Whether declaratory judgment relief sought in a civil rights action can be denied, when relief is sought on a state court proceeding, regardless of the aim, purpose or effect of such relief.

7. Whether or not the Civil Rights Act is to be narrowly or liberally construed.

8. Whether Petitioner's case was dismissed by the Court below for philosophic reasons rather than legal reasons, and as such sets a dangerous precedent for a Court of Appeals of the United States.

9. Whether or not an adjudication on the merits is to be frustrated in resolution because of such refinements, subtleties and technicalities within the law, that its own rules prevent it from examining its own rules.

THE STATUTES INVOLVED

The statutes involved are Title 42 U.S.C. §1983 (Civil Rights Act); Title 28 U.S.C. §1343 (3) (Jurisdictional); Title 28 U.S.C. §2283 (Stay of State Court Proceedings); Title 28 U.S.C. 2201 (Declaratory Judgment Act); Title 28 U.S.C. 2202 (Additional relief) and Rules 1 and 57 of the Federal Rules of Civil Procedure for the United States District Courts. All of the foregoing are printed in Appendix A, *infra*.

STATEMENT.*

Petitioner was arrested May 12, 1962 and charged with the violation of a traffic ordinance of the City of Chicago. The ordinance carries criminal sanctions of fine and imprisonment for non-payment of the fine. Under Illinois decisions and the customs and practices of the Municipal Court of Chicago all ordinance prosecutions are tried and reviewed as civil matters, under rules of civil procedure.

Petitioner brought this action in the United States District Court July 3, 1962 under the Civil Rights Act, 42 U.S.C. 1983, invoking jurisdiction under 28 U.S.C. 1343(3) (Appendix A-1) seeking declaratory judgment relief under 28 U.S.C. 2201 (Appendix A) declaring his right to be tried under rules and principles of criminal procedure, as a matter of due process of law guaranteed under the Fourteenth Amendment, Section 1, to the Constitution of the United States. Petitioner further prayed for injunctive relief, either mandatory (R. 37) to compel the defendants to try him criminally, or prohibitory, (R. 74) to restrain the defendants from prosecuting and trying him civilly. Although the customary fine upon a conviction is small, the issues of due process of law are substantial.

The defendants are Burton Palmer, a trial assistant in the Traffic Court to whom Petitioner's traffic case was originally assigned; Judge Wells, then presiding judge of the Traffic Court and Judge Bowe, Chief Justice of the Municipal Court of Chicago. Mr. John Melaniphy, Corporation Counsel of the City of Chicago and its chief ordinance prosecuting official was also joined.

In response to the complaint first filed (R. 4), the judicial defendants filed an answer (R. 21). Defendant Melaniphy filed a motion to dismiss the complaint (R.

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* (R.) refers to the Record filed with the Court below, there entitled "Appendix."

30) alleging that the City of Chicago was a necessary and indispensable party, if the complaint was otherwise good. Accordingly, on August 14, 1962 Petitioner filed his Amended Complaint (R. 37) adding the City of Chicago as an additional party defendant, expanding his allegations and attacking the constitutionality of the ordinance Petitioner was charged with as a civil offense. Defendants filed motions to dismiss the amended complaint (R. 81, 85). Briefs were filed by all parties on the motions to dismiss. On November 29, 1962 the District Court Judge entered an order dismissing the cause "for lack of jurisdiction." (R. 92). No findings, memorandum or opinion were made.

This is a test case. It was filed after Petitioner's arrest to avoid an issue of "standing" as a bar to consideration of the controversy. Petitioner has obtained a succession of continuances with the cooperation of the defendants (R. Inside back cover) and (Appendix D). Petitioner's concern for "standing" is manifested in his motion for a continuance to keep the ticket "alive" (Appendix F). A hearing on the ticket is now set for September 10, 1963, on which date a continuance will again be sought, and if denied, a bond posted pending determination of this petition. Petitioner has transmitted to this Court a transcript of a subsequent ordinance violation, April 10, 1963, pursuant to which the Petitioner pleaded not guilty, was found guilty May 8, 1963, and paid a fine. This conviction is brought to the attention of the Court for the purpose of showing that Petitioner is under a continuing exposure of civil proceedings in penal ordinance prosecutions. The sheer numbers of annual traffic prosecutions in Chicago makes it a statistical probability to be arrested at least once a year (R. 79). Although Petitioner did not file a class action, the unmistakable intent and purport of his

Amended Complaint is to secure procedural rights for himself and all others. (R. 65, 70, 72). In view of the more direct and serious threat of imprisonment in non-traffic ordinances as well as multiple violations of traffic ordinances, the benefits herein sought will accrue more critically to persons exposed to prosecution for or convicted of more serious ordinance infractions. Therefore, in Petitioner's view, his own "standing" as a presently arrested person is sought to be preserved with respect to his right to invoke this action. Because of uncertainty in this respect, however, he has sought successive continuances. Petitioner has expressly waived all error and objections to the form and manner of his arrest so as to preserve the issues of this cause and focus attention on the issues raised and nothing else. Petitioner has been obliged to come to grips with this procedural hocus pocus in order to obtain a ruling on procedural law.

The ordinance Petitioner was arrested for violating carries a maximum fine of $200. (R. 52-53). Failure to pay a fine imposed can result in imprisonment at labor in the House of Corrections to be worked out at the rate of two dollars a day. There are continuously over 500 men in the House of Correction for non-payment of fines. The ordinance (R. 43) is almost a verbatim re-enactment of an Illinois statute. Under the statute the maximum fine for a first offense is $100.; failure to pay it can result in imprisonment satisfied at the rate of five dollars per day. (R. 52). The ordinance clearly imposes stricter sanctions than the statute and points up the absurdity of allowing the ordinance to be prosecuted civilly whereas the statute must be prosecuted criminally.

The violation of all penal statutes in Illinois is at least a misdemeanor (R. 47); traffic statutes are expressly declared misdemeanors (R. 46). If Petitioner had been

charged under the statute he would of needs be prosecuted criminally. This would include: a) A presumption of innocence; b) Proof beyond a reasonable doubt for conviction; c) Criminal particularity of the complaint or information; d) The right against double jeopardy under the Illinois Constitution; e) A statute of limitations; f) All the traditional defenses in a criminal prosecution; g) No waiver of defects in the complaint as a result of proceeding to trial; h) Trial under rules of criminal procedure; i) Review on appeal, as a criminal case.

Under an ordinance prosecution, none of the foregoing principles apply. For almost a hundred years all ordinances in Illinois have been and are prosecuted, adjudicated and reviewed as civil proceedings. (R. 50, 51, 76, 77, 66-67, 81). The common law action in debt or assumpsit, for violation of a corporate by-law has been obliterated so that today municipal ordinances are just like statutes in force of law and severity of punishment. Actions are commenced by arrest or warrant (R. 54-55) and enforcement procedures parallel those of statutes. The ultimate sanctions are criminal punishment. Petitioner alleges that arrest itself is the initiation of a criminal proceeding (R. 53-55, 57) and that any distinction between ordinances and statutes is without fundamental basis (R. 57).

Petitioner claims that a prosecution for a crime under civil principles and rules of procedure is a denial of fundamental safeguards of personal liberty and constitutes a denial of due process of law under the Fourteenth Amendment, Section 1, to the Constitution of the United States. (R. 72-74).

Dismissals for "lack of jurisdiction" have prevented a consideration of the merits.

Petitioner alleges that he has no remedy at law and that Illinois courts have so repeatedly affirmed the civil concept in ordinance cases that it would avail him not to pursue any remedy there. (R. 70).

REASONS FOR GRANTING THIS WRIT.

1. The dismissal of Petitioner's action for "lack of jurisdiction" by the District Court, on motions to strike, without findings, memorandum or opinion justifying the dismissal, sets a dangerous precedent in permitting arbitrary dismissals in Civil Rights Act cases asserting constitutional rights.

2. The opinion of the Court below, sustaining the dismissal for "lack of jurisdiction" was based on its own philosophic and policy considerations which eschews civil rights cases. Such considerations are untenable in law and conflict directly with the aims and purposes of the Civil Rights Act as construed and declared by this Court.

3. As a result of the dismissal, important constitutional questions of due process of law affecting the entire legal machinery involved in ordinance prosecutions have received no consideration on the merits.

4. On the merits, federal authorities uniformly and overwhelmingly sustain Petitioner's theses upon which his entire case is predicated—namely, that ordinances are crimes and must be prosecuted criminally and not civilly. *Helvering* v. *Mitchell*, 303 U.S. 391, 398. No jurisdictional statute is more appropriate to pronounce a declaratory judgment to that effect than the Civil Rights Act. If no relief is available under that Act in this action then relief available under the Act is reduced to little more than damage suits and desegregation orders.

5. No Federal Court has ever dealt with the question of whether a trial under civil principles and rules of procedure for violation of an ordinance carrying criminal sanctions is a denial of Federal due process of law. There is urgent need for an adjudication of this point because:

a) "With thousands of ordinance violators sentenced to imprisonment and many more subjected to heavy fines, we can no longer indulge in the superficialism of an earlier day that denied to such persons the customary constitutional rights of persons being criminally prosecuted on the theory that ordinance prosecutions are civil proceedings." Anticau, "The Constitutional Rights of Persons Charged With Violating Municipal Ordinances," 48 Georgetown L. Rev. 1, 2.

b) "The constitutional rights of those who violate municipal ordinances often appear to be grossly transgressed in many shocking instances." *Id.* 1.

c) Procedural safeguards are as fundamental to the doing of justice in an ordinance prosecution as any other prosecution, and especially where the possible punishment includes incarceration. The denial of these safeguards on the theory that ordinance violations are but "petty offenses" or that ordinance prosecutions are "only civil" actions should be abandoned forthwith. *Id.* pages 41-42.

d) The fabric of American justice has been corrupted by police court abuses. These abuses thrive in the imprecise, undefined realm of civil procedure wherein loose practices and expediency governs the adjudication of cases involving personal liberty. Traffic court experiences are the only contact the majority of citizens have with any court. *People* v. *Perlman*, 1957, 15 Ill. App. 2d 229, 241.

e) A shocking lack of confidence exists in the minds of the American public about the possibility of obtaining a

fair trial. (Appendix F 14a). This lack of confidence surely springs in part from police court experiences where swift "justice" is dispensed. The American public has a keen sense of Yankee fairness, however unsophisticated it may be about the niceties of legal procedure.

f) Fairness ceases in a trial atmosphere where civil rules prevail and trifling testimony is sufficient to convict. Easy convictions under vague concepts and unsettled rules applicable to such "civil" prosecutions have converted city police and traffic courts into revenue producing factories. (R. 79). Legitimate objectives of law enforcement have been lost sight of.

g) Easy convictions under civil rules invite easy arrests, easy searches, easy seizures, easy detentions, easy police brutality. Are these not the stealthy encroachments upon constitutional rights Mr. Justice Bradley so eloquently argued for in *Boyd* v. *United States*, 116 U.S. 616, 636? Never in this history of this Court, prior to *Brown* v. *Board of Education*, 347 U.S. 483, has it been visited with so many petitioners for certiorari to review police court convictions for minor crimes. *Johnson* v. *Virginia*, 373 U.S. 61; *Shuttlesworth* v. *City of Birmingham*, 373 U.S. 262; *Garner* v. *Louisiana*, 368 U.S. 157; *Thompson* v. *City of Louisville*, 362 U.S. 199. Such convictions breed in an atmosphere unguided by procedural standards.

h) The financial impracticality of retaining counsel to defend minor offenses exposes the accused to the special hazard of an *ad hoc* determination. Unless the law interposes some formal standards of procedural protection which the judicial oath has sworn to uphold, the defendant becomes at once the helpless victim of the law's inadequacy and unconcern. The layman's concept of common sense fairness is the guiding determinant of his attitude

toward the legal process. A casual civil proceeding, unmarked by formal guidelines, which fails to comport with his own sense of fairness—this is the subject of his discontent, not the punishment imposed.

i) Perhaps no area in the entire law, state to state, is filled with as many ambivalences and inconsistencies as is the field of ordinances. Such ambivalence and inconsistency is expressly noted in *Village of Maywood* v. *Houston*, 1956, 139 N.E.2d 233, 234; 10 Ill. 2d 117, rehearing denied; and in *City of Chicago* v. *Lewis*, 1961, 171 N.E.2d 70, 72; 28 Ill. App. 2d 181; also, *State* v. *Hoben*, 1959, Minn. 98 N.W.2d 813, 818. In some states a preponderance of evidence will convict; in others, more than a preponderance; in Illinois, a clear preponderance; in some, proof beyond a reasonable doubt. In many jurisdictions the rule varies depending on the particular ordinance, whether it was a crime at common law, what measure of punishment conviction may impose, whether there is a coexisting statute covering the identical offense. State constitutions have undergone major judicial reconstructions to prevent ordinance violators from obtaining state guarantees prescribed for persons charged with crimes or criminal offenses, or even offenses, as in Illinois. The aim of these judicial reconstructions has been to preserve the rule of expediency in ordinance prosecutions. *City of Colorado City* v. *Morris*, 1958, Colo. 323 P.2d 614, 617. The emasculation of constitutional rights inherent in the prevailing philosophy of expediency in the field of ordinance prosecutions has implanted into the fabric of State law a departure from fundamentals in approach and criteria. "The compelling answer to this is that the Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may go free or for any other expedient reason." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 184.

That such a departure from fundamentals finds its way into far more serious cases than ordinance is evident. *Lynumn v. Illinois*, 372 U.S. 528. See *Bantam Books* v. *Sullivan*, 372 U.S. 58, 70; *Speiser* v. *Randall*, 357 U.S. 513.

The entrenchment of expedience as the guiding consideration in ordinance prosecutions is manifest in Illinois where it has prevailed for 93 years, during which time not a single reported case has given more than a passing comment on the procedural due process question involved.

6. The jurisdictional dismissal by the Court below was based on its own philosophy,* not on the law as articulated by this Court. So transparent in law is the *rationale decidendi* of the Opinion below that on no other grounds, save philosophic ones, can the dismissal be sustained on the unsupported conclusion that no relief was available under the Civil Rights Act.

After Petitioner filed his Complaint, Defendants Palmer, Bowe and Wells filed an Answer, thereby submitting to the jurisdiction of the District Court (R-21). The Answer alleges that the Complaint fails to state a claim upon which relief can be granted (R-27) but it relies on the following reasons: a) There is no controversy between the parties (R-22); b) There is a judicial immunity (R-27); c) The particular judge who will preside over Plaintiff's state court trial cannot be ascertained (R-28); d) The issues raised by Plaintiff can be raised in the state court (R-29); and e) 28 U.S.C. 2283 (Appendix A) is an independent bar to injunctive relief (R-29).

Petitioner replied: There was a controversy between the parties. *Evers* v. *Dwyer*, 358 U.S. 202; *Baker* v. *Carr*, 369

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* The conservative philosophy was mentioned in *Egan* v. *City of Aurora*, 174 F.Supp. 794, 798. See also *Cohen* v. *Norris*, 9 Cir. 300 F.2d 24, 29.

U.S. 186; *Poe* v. *Ullman*, 367 U.S. 497. There is no judicial immunity under the Civil Rights Act, at least in non-money claims. *Adams* v. *City of Park Ridge*, 7 Cir. 293 F.2d 585; *Hatfield* v. *Bailleaux*, 9 Cir. 290 F.2d 632, cert. denied, 368 U.S. 862. Petitioner has an original federal remedy under the Civil Rights Act, irrespective of a state court remedy. *McNeese* v. *Board of Education*, 373 U.S. 668. 28 U.S.C. 2283 is inapplicable because no stay of the state court proceeding was sought and no such stay was ever applied for. Defendant Judge Bowe removed the state case from Trial Assistant Palmer and assigned it to Judge Wells (succeeded to in office by Defendant Judge Cwiklinski) with instructions (Appendix D) to continue the state case during the pendency of this federal action. There was no federal intervention in the state case. The federal action was acquiesced to by the judicial defendants on orders of Judge Bowe (R-Letter, back cover). On no occasion, during the many continuances obtained in the state court, did the Defendants City of Chicago or its Corporation Counsel object. The Record of the Municipal Court shows no objections.* They too acquiesced. Petitioner stated a cause of action under the Civil Rights Act. *Douglas* v. *City of Jeannette*, 319 U.S. 157, 161, 162. On the basis of the Answer of the judicial defendants herein, nothing was stated upon which to base a denial of jurisdiction or relief.

The motion to strike the Complaint filed by the Defendant Melaniphy adds these additional points: a) If the Complaint is otherwise good the City of Chicago is a necessary party (R-30); b) 28 U.S.C. 2283 somehow furnishes an immunity to the Corporation Counsel as a quasi-judicial officer, and also to the City of Chicago (R. 32-33);

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* The record of the Municipal Court of Chicago in the case pending against the Petitioner has been transmitted to the Clerk.

c) There must be an actual denial of due process of law before a cause of action arises under the Civil Rights Act (R-35).

Petitioner replies. A threatened deprivation of constitutional rights is sufficient to invoke the Civil Rights Act. *Ex'rs* v. *Dawes*, 358 U.S. 202, Per Curiam; *Poe* v. *Ullman*, 367 U.S. 497; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; Title 42 U.S.C. 1983.

Without waiting for a ruling on the motion to strike, Petitioner obtained leave and filed his Amended Complaint (R-38) adding the City of Chicago as additional party defendant.

Examination of the motion to strike the Amended Complaint, filed by Defendants Palmer, Bowe and Wells reveals only one fresh point—that the Amended Complaint did not show irreparable injury upon which to predicate equitable relief (R-85). The motion to strike the Amended Complaint filed by Defendants City of Chicago and Mr. Melaniphy adds no fresh points. In neither motion to strike is it suggested that 28 U.S.C. 2283 is a bar to a declaratory judgment.

Petitioner replies. The rule of *Ponzi* v. *Fessenden*, 258 U.S. 254, 260 applies. The Amended Complaint constitutes an attack on the necessary state court machinery which denies a fair trial. The equitable need for federal intervention is inherent to prevent a patent injustice. Title 28 U.S.C. 2283 was not intended to apply in such a situation. In addition, it appears that as a result of Petitioner filing an Amended Complaint, the judicial defendants were presented with an opportunity to replace their Answer with a motion to strike. Can jurisdiction of the District Court be divested by a mere shuffle of pleadings?

The motions to strike, upon which the dismissal "for lack of jurisdiction" was entered are themselves barren in substance to justify a dismissal, and especially so on the grounds that no relief could be granted.

On what grounds then was the availability of relief found so wanting, on appeal, so as to affirm the dismissal by the District Court? The answer to this is "philosophic" grounds.

The Opinion below states that Petitioner "does not cite any judicial precedent to justify his demand for a declaratory judgment and an injunction." (Appendix B-5a) In fact, Petitioner's briefs invoked numerous propositions of law

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[1] Plaintiff need not first exhaust state remedies before proceeding under 42 U.S.C. 1983. *Monroe* v. *Pape*, 365 U.S. 167; *Adams* v. *City of Park Ridge*, 7 Cir. 293 F.2d 585; Judicial or municipal immunity does not apply under the Civil Rights Act in an action not involving money damages. *Adams* v. *City of Park Ridge*, *supra*. A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45, 46; *Cohen* v. *Norris*, 9 Cir. 300 F.2d 24, 31; Facts well pleaded in the complaint are taken as true and admitted and construed in the light most favorable to the plaintiff, *Kossick* v. *United Fruit Co.*, 365 U.S. 731; Motions to dismiss are to be granted sparingly, courts favoring giving a party his day in court. *Kingswood Oil Co.* v. *Bell*, 7 Cir. 204 F.2d 8; The fact the plaintiff may not be entitled to all the relief sought does not warrant dismissal of the action. *Dann* v. *Studebaker-Packard Corp.*, 6 Cir. 288 F.2d 215, 216; Pleadings in Civil Rights cases are liberally construed. *Gager* v. *Bob Seidel*, C.A. D.C. 300 F.2d 727; *United States* v. *Wood*, 5 Cir. 295 F.2d 772; Plaintiff's complaint presents substantial federal questions arising under the Constitution which are sufficient to invoke jurisdiction without the additional reliance of 42 U.S.C. 1983. *Doud* v. *Hodge*, 350 U.S. 485; *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306, 311; *Bell* v. *Hood*, 327 U.S. 678, 682, 681; Denial of a fair trial is a denial of due process, and

and cited abundant authorities on the question.[1] NONE of these found their way into the Opinion.

But the principal case relied on, analogized with, and cited again and again in Petitioner's briefs was *Adams* v. *City of Park Ridge*, 7 Cir., 293 F.2d 585.[2] So akin were

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[1] (Continued)
plaintiff is threatened with denial of a fair trial. *Lyons* v. *State of Oklahoma*, 322 U.S. 596, rehearing denied, 323 U.S. 809; *Hannah* v. *Larche*, 363 U.S. 420, 442; *Alexander* v. *Daugherty*, N. Y. 189 F.Supp. 955, 959. (partial list)

[2] Petitioner's Brief and Reply Brief cited and argued *Monroe* v. *Pape*, 365 U.S. 167; *McNeese* v. *Board of Education*, 373 U.S. 668 (filed with the Court below on Motion, June 4, 1963, Record Transmitted); *Baker* v. *Carr*, 369 U.S. 186; *Poe* v. *Ullman*, 367 U.S. 497; *Staub* v. *City of Baxley*, 355 U.S. 313; *Dowd* v. *Hodge*, 350 U.S. 485; *Bell* v. *Hood*, 327 U.S. 678 (excerpted at length); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; *Evers* v. *Dwyer*, 358 U.S. 202; *Cohen* v. *Norris*, 9 Cir. 300 F.2d 24; *Marshall* v. *Sawyer*, 9 Cir. 301 F.2d 639; *Willie* v. *Harris County, Texas*, 190 F. Supp. 560; *Gager* v. *Bob Seidel*, C.A. D.C. 300 F.2d 727; *United States* v. *Wood*, 5 Cir. 295 F.2d 772; *Douglas* v. *City of Jeannette*, 319 U.S. 157; *Public Service Commission* v. *Wykoff Co.*, 344 U.S. 237. (partial list).

[3] In *Adams* v. *City of Park Ridge*, 293 F.2d 585, members of the Chicago Heart Association brought an action for declaratory judgment and an injunction under 28 U.S.C. 1343 (3) to declare an ordinance unconstitutional and to enjoin prosecutions thereunder. No arrests had been made. Plaintiff's Complaint alleged that *if* Heart Association volunteers "are willing to conduct solicitations without a permit under said ordinances said volunteer workers would be threatened with penal fines and irreparable injury because of their enforcement." The only other basis for injunctive relief was the threatened loss of $10,000. in charitable contributions. (*Adams, et al.* v. *City of Park Ridge*, No. 59 C 496, District Court, Northern District of Illinois, Eastern Division, Complaint, Par. 12) The District Court made a seven-page memorandum consisting of findings of facts and conclusions of law. The findings of fact state: "The plaintiffs

the propositions of law in the instant case to those decided in *Adams, supra*, that Petitioner stated in his Reply Brief, page 18: "If jurisdiction can be sustained in *Adams* v. *City of Park Ridge*, 293 F.2d 585, it cannot be denied here." The Opinion of the Court below in the instant case MAKES NOT A SINGLE REFERENCE to *Adams* v. *City of Park Ridge, supra*.

Adams v. *City of Park Ridge*, 293 F.2d 585 is a remarkable case.* In *Adams, supra*, not only was an ordinance declared unconstitutional as applied, but city officials, including the mayor and chief of police were prospectively enjoined from making arrests. But none of the cases or

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have not suffered irreparable injury because of the denial of the permit to conduct the Heart Sunday Campaign in the City of Park Ridge." "Plaintiffs have an adequate remedy in the Illinois State Courts." (Memorandum, Pars. 17 and 18). The Memorandum made conclusions of law that it had no jurisdiction of the subject matter, denied the injunction and held the ordinance in question constitutional. It dismissed the cause for want of jurisdiction.

Adams v. *City of Park Ridge*, 293 F.2d 585 is remarkable for several reasons. First, it overruled *Douglas* v. *City of Jeannette*, 319 U.S. 157 without saying so. Second, it did so in reliance on a collection of desegregation cases having nothing whatever to do with enjoining arrests for violations of local laws. *Adams, id*, page 587. Third, it made no mention of the cases or arguments of the appellee. Fourth, it allowed a prospective injunction enjoining city officials from arresting canvassers, without finding that plaintiffs had suffered or were threatened with suffering irreparable harm. Fifth, it omitted reference to the District Court Memorandum which made an express finding of no irreparable injury. Sixth, its relief is posited on this statement: "No reason is apparent why a City . . . should not be restrained from prospectively violating plaintiffs' constitutional rights . . . and an injunction not be granted. . . ." Seventh, the result is excellent. No grievous injury has been done to the federal-state relationship; no subversion of the orderly processes of

arguments made in appellee's brief appeared in the opinion, notwithstanding the fact that *Douglas* v. *City of Jeannette*, 319 U.S. 157 was directly in point. That *Adams* v. *City of Park Ridge*, *supra*, was decided without reference, either to appellees' authorities, and the authorities of this Court, and was decided without mention of the District Court Memorandum creates a parallel with the instant case. It appears obvious that the philosophy of the Court below embraced *Adams* v. *City of Park Ridge*, but *did not* embrace the instant case.

Such unilateral decision making, predicated on a philosophic determination of which actions shall prevail and which shall not, is in conflict with objective principles of adjudication laid down by this Court. Indeed, both *Adams* v. *City of Park Ridge*, *supra*, and the instant case, manifest a circumvention of judicial process by avoiding considering cases decided by this Court simply by ignoring their existence.

In *McNese* v. *Board of Education*, 7 Cir. 305 F.2d 783, dismissing the cause, not a single reference was made to

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(Continued)

local law enforcement has occurred; no criminals were allowed to avail themselves of a federal forum for a procedural purpose. In effect, a discriminatory ordinance has been gotten off the books, and canvassers are now free to raise money for the Heart Association without the accompaniment of a lawyer to post bond, in preparation for arguments on constitutional law before a justice of the peace. Complete relief has been obtained in one action.

On appeal, the appellee, City of Park Ridge, devoted the major argument of its brief (=13260, Pages 19-29) to a denial of federal equity jurisdiction to enjoin arrests and prosecutions, citing and arguing at length, *Douglas* v. *City of Jeannette*, 319 U.S. 157; *Stefanelli* v. *Minard*, 342 U.S. 117; *Watson* v. *Buck*, 313 U.S. 387 and *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89.

this Court's opinion of *Monroe* v. *Pape*, 365 U.S. 167.* Yet *Monroe* v. *Pape*, *supra*, is the very case in chief relied upon by this Court, in reversing, *McNeese* v. *Board of Education*, 373 U.S. 668.

Similarly, in *Spires* v. *Bottorff*, 7 Cir., 317 F.2d 273, the authority relied on to sustain a money damage suit under the Civil Rights Act was not *Monroe* v. *Pape*, 365 U.S. 167, but *Hatfield* v. *Bailleaux*, 290 F.2d 632, cert. denied, 368 U.S. 862.

It seems apparent that the availability of the Civil Rights Act in the Seventh Circuit, as an instrument for the vindication of constitutional rights, will continue to receive a strictness of judicial treatment well calculated to discourage such actions. In the unsettled area of equitable relief, further articulation by this Court is needed.

The broad purposes of the Civil Rights Act were fully spelled out in the detailed attention accorded that Act by this Court in *Monroe* v. *Pape*, 365 U.S. 167 and again in *McNeese* v. *Board of Education*, 373 U.S. 668. Custom and usages enforced by persons acting under color of office which subject or cause to be subjected a person to deprivation of constitutional rights gives that person a cause of action, in law or equity, under the express provisions of 42 U.S.C. 1983 (Appendix A-1). Not a single existing federal judicial principle or Congressional Act

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*Two months after *Monroe* v. *Pape*, 365 U.S. 167, the Court below said in *Hardwicke* v. *Harlan*, 7 Cir. 289 F.2d 529, 530: "The *real issue* now before us in the instant case is whether *Monroe* v. *Pape* can be distinguished so as *not to be applicable* to the case at bar." (emphasis added). In *Egan* v. *City of Aurora*, 7 Cir. 291 F.2d 706, on reversal in part and remand by this Court (365 U.S. 514), after a second dismissal by the District Court, the Court below stated: "However, under recent decision of the Supreme Court, we feel that *there is nothing we can do but reverse* the judgment of the District Court . . ." (emphasis added).

need be compromised, modified or distinguished to accommodate this action, either on jurisdictional grounds or for relief. Insofar as this action asserts rights which go to the benefit of the public at large, it fulfills the more substantial concern of Congress and consequently invokes a correspondingly greater need for relief. *Monroe* v. *Pape*, 365 U.S. 167, concurring opinion of Mr. Justice Harlan, page 193. No countervailing principle of law is present why relief should be withheld or jurisdiction denied. There is no skein of state law which must be first unscrambled to clarify the issues. No situation is here presented akin to *Cleary* v. *Bolger*, 371 U.S. 392; *Stefanelli* v. *Minard*, 342 U.S. 117, *Wilson* v. *Schnettler*, 365 U.S. 381 or *Douglas* v. *City of Jeannette*, 319 U.S. 157.

7. The application of Title 28 U.S.C. 2283, by the Court below, as an independent ground for a jurisdictional dismissal, is in direct conflict with the very cases upon which the dismissal is grounded and the holdings of this Court in *Stefanelli* v. *Minard*, 342 U.S. 117 and *Cleary* v. *Bolger*, 371 U.S. 392.

Cleary v. *Bolger*, 371 U.S. 392 made no reference whatever to 28 U.S.C. 2283 as a basis for denying equitable relief. This omission was specially noted in the dissent of Mr. Justice Brennan, 371 U.S. at 412. Enjoining a witness from testifying is not within the purview of the proscribed stay of a state court proceeding specified in 28 U.S.C. 2283. Nor, in the instant case, would either an injunction to compel the defendants to accord Petitioner a criminal trial, or a declaration of his right to such a trial, have the effect of a stay. On the facts, 28 U.S.C. 2283, is no more applicable to this case than it was in *Cleary* v. *Bolger*, 371 U.S. 392.

The authority for the decision in *Cleary* v. *Bolger*, *infra*, is *Stefanelli* v. *Minard*, 342 U.S. 117, wherein equit-

able relief was sought under the Civil Rights Act to achieve a result similar to that sought in *Cleary*. But *Stefanelli* v. *Minard* denied relief, not on 28 U.S.C. 2283, but as a discretionary judicial denial based on federal-state relationships. Stefanelli only referred to 28 U.S.C. 2283 as a factor to consider as part of a larger judicial determination. That the Court had the power to grant the injunction, 28 U.S.C. 2283 notwithstanding, can hardly be doubted. *Stefanelli* v. *Minard*, 342 U.S. 117, 120; *Douglas* v. *City of Jeannette*, 319 U.S. 157, 162.

The factual situation of *Stefanelli* parallels that of *Cleary*. In neither case did 28 U.S.C. 2283 inhibit the power of the Court to grant the injunction, if its equitable wisdom dictated use of the power. The suggestion in the instant case, by the Court below, that 28 U.S.C. 2283 is an independent ground for a dismissal is both erroneous and irrelevant. An important footnote appears in *Stefanelli* v. *Minard*, 342 U.S. 117, 124: "Closer to the case before us are suits for injunctions grounded on the contention that *particular phases* of criminal proceedings are unfair." (emphasis added)

Both *Cleary* v. *Bolger*, 371 U.S. 392 and *Stefanelli* v. *Minard*, 342 U.S. 117 are posited on the denial of an injunction of a "particular phase" of a state criminal proceeding. See *Paugh* v. *Dollinger*, 365 U.S. 458, Per Curiam affirming the Fifth Circuit, 277 F.2d 739 and *Wilson* v. *Schnettler*, 365 U.S. 381, both of which relied on *Stefanelli* v. *Minard*, not 28 U.S.C. 2283. Similarly, general equitable standards denied the use of injunctive power in *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89; *Beal* v. *Missouri Pacific Rr.*, 312 U.S. 45, and *Watson* v. *Buck*, 313 U.S. 387. These are the cases relied on by the Court below. None employed 28 U.S.C. 2283 as an independent ground to deny jurisdiction, as a consequence of refusal

to give relief. Similarly, *Douglas* v. *City of Jeannette*, 319 U.S. 157 did not ascribe to 28 U.S.C. 2283 an independent basis for a denial of jurisdiction. (App. A, 6a-7a)

The instant case differs fundamentally on its facts and the relief it seeks from the foregoing cases. For in all of them is the common ground that no basis exists for federal equitable intervention because the defenses or claims being asserted can be equally made before the state tribunal. This point is most specifically made in *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163. There the unconstitutionality of the ordinance was adjudicated in the companion case of *Murdock* v. *Pennsylvania*, 319 U.S. 105. The availability of a state forum to raise federal issues was again noted in *Wilson* v. *Schnettler*, 365 U.S. 381, 385. But the issues in this cause cannot practically be raised before the state court.

In *Adams* v. *City of Park Ridge*, 7 Cir. 293 F.2d 585, both arrests and prosecutions in a state court were enjoined without a single reference to 28 U.S.C. 2283. In terms of enjoining prospective arrests, *Adams*, *supra*, was on all four squares with *Douglas* v. *City of Jeannette*, 319 U.S. 157. Even *Douglas*, *supra* only made passing reference to 28 U.S.C. 2283 as a basis for denying relief.

In *Goss* v. *Illinois*, 7 Cir. 312 F.2d 257, 259 it was said that 28 U.S.C. 2283 has not been modified by the Civil Rights Act. This is a legal *non sequitur*, premised on the notion that 28 U.S.C. 2283 at all times operated as a bar to federal intervention in a state court criminal proceeding, irrespective of the equities of the case, or even other considerations. *Rea* v. *United States*, 350 U.S. 214. It is here contended that the implication suggested in *Goss*, *supra*, that 28 U.S.C. 2283 is an independent basis for a dismissal of a civil rights action is in direct conflict

with *Stefanelli* v. *Minard*, 342 U.S. 117, and should be dispelled forthwith. That such a construction spilled over into the Opinion in the instant case is certainly suggested by it. Such erroneous construction placed on the operation of 28 U.S.C. 2283, or even the implication of such a construction, creates a spectre of dismissal which will tend to affirmatively discourage invoking the Civil Rights Act for equitable relief. The law can hardly grow under such shadows of doubt.

Not only is 28 U.S.C. 2283 inapplicable to the instant case as an independent basis to deny a remedy, it is inapplicable at all. 28 U.S.C. 2283 comes into play only as a jurisdictional consideration where on the facts of the case the relief sought effects a stay of a state court proceeding. In the absence of an application for relief amounting to a stay, the issue of its applicability to the question of jurisdiction is wholly irrelevant.

8. The application of federal equity principles in the Opinion of the Court below, as a basis upon which to deny relief and jurisdiction in this case is premised on enjoining an arrest or prosecution under a state or local law.[1] The cases cited in the opinion are so predicated. *Douglas* v. *City of Jeannette*, 319 U.S. 157; *Watson* v. *Buck*, 313 U.S. 387; *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45. Inasmuch as the instant case sought to enjoin

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[1] In *Douglas* v. *City of Jeannette*, 319 U.S. 157, 162-164 Mr. Justice Stone refers to the ordinance as a "criminal proceeding," "criminal prosecution," "criminal case," "criminal act" as a violation of "criminal law" and imposing "criminal liability." See *Pollock* v. *Williams*, 322 U.S. 4, 17 (footnote references to *City of Chicago* v. *Coleman*, 251 Ill. 328 and *City of Chicago* v. *Williams*, 251 Ill. 360); Also, *Lambert* v. *California*, 355 U.S. 225, 228; *Peterson* v. *City of Greenville*, 373 U.S. 244, 248; *Shuttlesworth* v. *City of Birmingham*, 373 U.S. 262, 263.

neither an arrest, nor a prosecution for a violation of a local law, nor enforcement of the ordinance, the foregoing cases do not apply.

The application of federal equity principles in the Opinion below, as a basis upon which to deny relief and jurisdiction in this case is further premised on enjoining the use of evidence in a state court prosecution. *Cleary v. Bolger*, 371 U.S. 392; *Stefanelli v. Minard*, 342 U.S. 117; *Pugach v. Dollinger*, 365 U.S. 458; *Wilson v. Schnettler*, 365 U.S. 381. Inasmuch as the instant case sought to enjoin neither the use of any evidence, nor any other "phase" of the state court proceeding, the foregoing cases do not apply.

In addition, all of the foregoing cases denied relief on the premise that the rights being asserted could be equally raised in the state court. But the customs and practices herein being challenged cannot practically be raised in the state court (*infra*, p. 29), and therefore these cases do not apply.

The pendency of Petitioner's traffic ordinance case creates an absurd contradiction. Under Municipal Court custom and usage, and Illinois decisions, the ordinance is civil, not criminal. The Court below, in adopting by analogy the Federal judicial rule that equity will not enjoin a state criminal prosecution, effectuates the contradiction of refusing to declare a crime a crime, (the very question raised on the merits) by denying jurisdiction to interfere in a state court criminal proceeding. In so doing it gives criminal recognition to the ordinance under which Petitioner is charged. Yet it denies jurisdiction to declare its conclusion by way of declaratory judgment. Such relief was eminently appropriate to this case.

Further applying federal judicial rule that equity will not enjoin a state criminal prosecution, the Opinion below

applied equitable roots to declaratory judgment branches as a basis for denying declaratory judgment relief. This concluded all relief prayed for, leaving nothing left.

9. In the absence of findings by the District Court, after it assumed jurisdiction that as a matter of law no relief could be granted in the instant case, the dismissal was in direct conflict with *Bell* v. *Hood*, 327 U.S. 678, 682. The order of dismissal for "lack of jurisdiction" rather than a judgment on the merits similarly conflicts with *Bell* v. *Hood*, *supra*:

> "Moreover where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684. See also *Dooley* v. *United States*, 182 U.S. 222, 228-230.
>
> "This may at times even require that a body of substantive law be fashioned to effectuate the policy underlying the grant of jurisdiction." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 451, 460. See *State of Alabama* v. *United States*, 5 Cir., 304 F.2d 583, 590; *United States* v. *Wood*, 295 F.2d 772, cert. denied, 369 U.S. 850; *Cleary* v. *Bolger*, 371 U.S. 392, Dissent, Mr. Justice Brennan, page 409; *Bailey* v. *Patterson*, 199 F.Supp. 595, Dissent Judge Mize, page 616, reversed in 369 U.S. 31, and remanded.

Every element for declaratory judgment was present in this case. "The Act must be liberally construed to obtain its objective. . . ." Barron & Holtzhoff, Federal Practice & Procedure, 1958, Vol. 3, page 275. Petitioner invoked federal jurisdiction under the Civil Rights Act. He has

standing. There is a justiciable controversy. All necessary parties are joined. There is a clear adversary position between Petitioner and Defendants. The controverted issue is neither hypothetical nor speculative. Is or is not a civil trial for a criminal act a denial of due process of law? Under all existing criteria this was an appropriate case for declaratory judgment. *Evers* v. *Dwyer*, 358 U.S. 202, Per Curiam; *Earnain* v. *International Ass'n of Machinists*, D.C. N.Y., 161 F. Supp. 391, cert. denied, 357 U.S. 916; *Baker* v. *Carr*, 369 U.S. 186, footnote, 200-201, 204, 208-237; *Public Service Commission* v. *Wykoff Co.*, 344 U.S. 237, 244, 248. Declaratory judgment is not to be denied at any whim of the trial court, nor is such relief to be arbitrarily refused in the absence of a showing of facts which constitute a recognized ground justifying a refusal to pass on the merits of a cause. *Mutual Life Insurance Co. of New York* v. *Krejci*, 7 Cir. 123 F.2d 594, 596, 597; *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227.

The court below said that 28 U.S.C. 2283 has not been modified by the Civil Rights Act or the Declaratory Judgment Act. *Goss* v. *State of Illinois*, 7 Cir. 312 F.2d 257, 259. The Opinion in the instant case construed *in pari materia* with *Goss* v. *State of Illinois, supra*, implies that declaratory judgment is not available here. But if 28 U.S.C. 2283 is wholly inapplicable to the instant case, as indeed it is, upon what other ground, if any, is declaratory judgment relief to be denied? To this question the Opinion below furnishes no answer.

Between *Goss* v. *State of Illinois*, 7 Cir. 312 F.2d 257 and *Adams* v. *City of Park Ridge*, 7 Cir. 293 F.2d 585, 587, "no reason is apparent" why declaratory relief could not be granted in this case. *Public Affairs Press* v. *Rickover*, 369 U.S. 111, Per Curiam, Dissent of Mr. Justice Douglas,

page 114; *Eccles v. Peoples Bank*, 333 U.S. 426, Dissents of Justices Reed and Burton, p. 436.

Had declaratory judgment relief been reached on the merits, chances are great no injunctive relief would have been necessary. It surely cannot be implied that the Honorable Judges of the Municipal Court of Chicago will not give obedience to a federal court declaration that ordinances must be tried under criminal rules of procedure as a matter of due process of law.

10. There are issues in this Petition invoking the practical implementation of relief under the Civil Rights Act which may be of more fundamental importance than Petitioner's own claim for relief.

The dismissal by the Courts below, not of the cause, and not on the merits, but apparently for failure to state a claim upon which relief can be granted, permits a civil rights action to be dismissed on no assignable grounds whatsoever. That such actions can be so dismissed, upon the unbridled discretion of a District Court Judge without findings of any kind, vests within him the extraordinary power to cut off the assertion of Federal constitutional rights in a manner inconsistent with the aims and purposes of the Civil Rights Act to make relief available. Appeal is no practical remedy to cure a jurisdictional dismissal. Few persons, without organizational support, can afford the considerable expense of appellate recourse. A dismissal not based on a finding, memorandum or opinion makes doubly difficult the appeal itself. That a District Court dismissal, per se, militates against an appellant is gainsaid. The instant case is a good example of such problems. If a plaintiff in a civil rights action must run the gauntlet of a dismissal without a corrolative duty upon the District Court Judge to formally set forth

his basis for dismissal, then the "broadening federal domain in the area of individual rights" will not be fulfilled. *McNeese* v. *Board of Education*, 373 U.S. 668, 673; *Douglas* v. *California*, 372 U.S. 353, 357.

It is here contended that a cause of action asserted under the Civil Rights Act cannot be dismissed unless the District Court Judge formally enters findings that, a) The complaint is deficient on a particular ground found and thereby fails to state a cause of action; or b) The complaint is frivolous as a matter of law; or c) The complaint fails to state a cause of action upon which relief can be granted, as a finding of fact and law, made only after an opportunity for a hearing on the issues, and upon memorandum or opinion.

Differences between rights and remedies were noted in *Fay* v. *Noia*, 372 U.S. 391, 420, 428. Also noted therein was the right to an evidentiary hearing. 372 U.S. 422, 424. See also *Jones* v. *Cunningham*, 371 U.S. 236, 243 and *Townsend* v. *Sain*, 372 U.S. 293, 316, 317. The Civil Rights Act has a grand purpose to protect individuals seeking to vindicate their constitutional rights, in areas affecting their personal liberty, no less grand in purpose than achieving those rights through habeas corpus. *Pages* v. *Cunningham*, *supra*. A dismissal of a civil rights action based on no relief, without an independent hearing on that question, does not comport with due process of law, and the promise of this Court to make federal judicial forums the guardians and guarantors of swift and imperative justice. *Fay* v. *Noia*, 372 U.S. 391, 435; *Watson* v. *Memphis*, 373 U.S. 526, 532.

PETITIONER CANNOT RAISE THE ISSUES OF THIS CASE BEFORE THE STATE TRIAL COURT.

The Municipal Court of Chicago, wherein Petitioner's ordinance prosecution is pending operates under its own Civil Practice Rules which expressly exclude declaratory judgment. (Civil Practice Rules, Section 57.1, In Effect Jan. 1, 1960). The issues raised herein directly cannot be raised there directly.

To frame the issues in an adjudicable way, Petitioner must ask for a jury trial, tender instructions applicable to a criminal case, have them refused, be found guilty, and preserve a record for appeal. An acquittal would moot the issue.

Assuming Petitioner did all that and appealed, invoking a constitutional challenge, herein lies the greatest uncertainty of all. Appeals raising constitutional questions are properly taken direct to the Illinois Supreme Court. But if that Court decides no constitutional issue is raised or that the case can be decided on other grounds it will remand to a Division of the Illinois Appellate Court. This remand is without opinion and concludes the constitutional issues. This is precisely what occurred in *City of Chicago v. Campbell*, 27 Ill. App. 2d 456; 170 N.E. 2d 19, wherein the defendant was fined $2,300. for building violations, involving a potential imprisonment of three years. The Court said: "If a cause, in which constitutional issues are advanced, is transferred to the Appellate Court, it must be concluded that the Supreme Court has determined no such issues are involved or that they are not material to the disposition of the appeal." *City of Chicago* v. *Campbell, supra.* In *City of Chicago* v. *Carney*, 34 Ill. App. 2d 303, 305, the appellant contended the liquor ordinance was criminal because of a coexisting penal statute

on the subject and that the defendant had to be proved guilty beyond a reasonable doubt." The contention was rejected, the Court using a balancing test—"The record *probably* satisfies even this degree but it is not necessary to apply this higher standard."

Directly in point here is *City of Chicago* v. *Lewis*, 28 Ill. App. 2d 189, 171 NE2d 70 involving the disorderly conduct ordinance, the same ordinance condemned by this Court in *Terminello* v. *City of Chicago*, 1948, 337 U.S. 1 as unconstitutional as applied as a denial of free speech. This is the same bogey ordinance under which hundreds of arrests were recently made in Chicago in segregation demonstrations. This is the "arrest" ordinance of city police for practically anything at all, or nothing whatever. In *City of Chicago* v. *Lewis*, *supra*, defendant appealed his conviction on the ground that the complaint was so loosely drawn as not to comport with required standards of criminal particularity. In his Brief, (#48076, page 3) and Reply Brief (page 4) defendant contended that the particularity of the charge was a denial of criminal substantive rights and procedural guarantees. The opinion states: "The complaint charges that defendant made an improper noise, riot and disturbance. This is substantially the same as saying he was engaged in a riot or made a noise." *City of Chicago* v. *Lewis*, 1960, 28 Ill. App. 2d 189, 192. Further saying, page 194: "There is room for improvement no doubt, but it would be of questionable wisdom to subject prosecution for violation of city ordinances to the rigid technical requirements of pleading in criminal cases." Making a noise, unquantitatively defined or charged, is now the basis for a conviction under this interpretation. The dangers to personal liberty are nothing less than awesome if such a flimsy charge can predicate a criminal conviction. The vehicle of civil

procedure strips bare every accepted concept of American standards of justice in these cases.

But most conclusively establishing the utter futility of a state court challenge are three cases. In *People v. Good*, 385 Ill. 584, 592, a felony case, it was held that the guaranties of the Fifth Amendment to the U.S. Constitution are the same in effect as Sec. 2, Article 10 of the Illinois Constitution and are construed alike. Section 2, Article 10 of the Illinois Constitution provides: "No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense."

In *City of Chicago v. Lord*, 1954, 3 Ill. App. 2d 410, 417, 122 NE2d 439; affirmed, 7 Ill. 2d 379, 130 NE2d 501, it was held that an ordinance was a criminal offense under the first half of Section 2, Article 10 of the Illinois Constitution so as to allow the privilege against self-incrimination to apply. But the opinion still held the ordinance civil for every other purpose. Two years later, in *Village of Maywood v. Houston*, 10 Ill. 2d, 137, 139 NE2d 233, rehearing denied, it was expressly held that the double jeopardy prohibition of the first half of Section 2, Article 10 of the Illinois Constitution did not apply to ordinances. It reaffirmed a policy of allowing municipalities to appeal ordinance acquittals. This kind of judicial surgery to the Illinois Constitution has now transformed Sec. 2, Article 10 to mean: No person shall be compelled in any *ordinance or statutory case* to give evidence against himself or be twice put in jeopardy for the same *statutory offense*. In the face of a constitutional reconstruction to preserve the civil character of ordinances it would not avail Petitioner to resort to a state court appeal. Even Illinois courts do not require useless acts. "To compel a property owner to first seek local relief in the face of the demonstrated attitude of the local authority, would be a patently useless step which would increase costs, promote cir-

cuitry of action and delay the administration of justice." *Van Laten* v. *City of Chicago*, 1963, 190 NE2d 717, 718. "Thus to remit respondent to his remedy by appeal in the state courts is to set him adrift on a sea of legal uncertainties, and very possible to deprive him, in the end of any remedy whatever." *Cleary* v. *Bolger*, 371 U.S. 392, Dissent, Mr. Justice Brennan, page 414.

The issues raised in this case will be decided in a federal forum or nowhere. The procedural and appellate complexities in Illinois are insurmountable.

SPECIAL NOTE

On Petitioner's representations to defendant, Judge Bowe, Chief Justice of the Municipal Court of Chicago, and to defendant, Judge Casimir Cwiklinski, Chief Judge of the Traffic Court of the Municipal Court of Chicago, that Petitioner's "standing" might be impaired in the event the ordinance charge now pending was adjudicated prior to this Court's determination of this Petition, Petitioner has obtained the affirmative assurances of Judges Bowe and Cwiklinski, respectively, on September 4 and 5, 1963, that said ordinance charge will be continued generally until all matters before this Court have been concluded. Petitioner gratefully acknowledges these assurances as a continuing manifestation of good will toward this Petitioner in this action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A.

STATUTES INVOLVED

Title 42 U. S. Code, § 1983:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 28 U. S. Code § 1343 (3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, or of any right, privilege or immunity secured by the Constitution of the United States or by any Acts of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Title 28 U.S. Code §2283:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments.

Title 28 U.S. Code, §2201:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes any court of the United States upon the filing of an

appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Title 28 U.S. Code §2202:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment.

FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Rule 1.

Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. As amended Dec. 29, 1948, eff. Oct. 20, 1949.

Rule 57.

Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. As amended Dec. 29, 1948, eff. Oct. 20, 1949.

APPENDIX B

Opinion of the

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 14068 SEPTEMBER TERM 1962—APRIL SESSION 1963

GEORGE WOJCIK,
Plaintiff-Appellant,
v.
BURTON PALMER, Trial Assistant Municipal Court of Chicago, (ALFONSE WELLS) CASIMIR V. CWIKLINSKI, Supervising Judge of Traffic Court, Municipal Court of Chicago, AUGUSTINE BOWE, Chief Justice, Municipal Court of Chicago, JOHN MCGANNEY, Corporation Counsel, City of Chicago, and CITY OF CHICAGO, a Municipal Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 13, 1963

Before DUFFY, KNOCH and SWYGERT, *Circuit Judges.*

DUFFY, *Circuit Judge.* This suit was brought under the federal Civil Rights Act, 42 U. S. C. §1983, for a declaratory judgment and for injunctive relief. The original complaint names as defendants, Burton Palmer, a Trial Assistant at the Traffic Violations Center of the Mu-

nicipal Court of Chicago; Judge Alfonse Wells,[1] then Supervising Judge of the Traffic Center of the Municipal Court of Chicago; Judge Augustine Bowe, Chief Justice of the Municipal Court of Chicago, and John Melaniphy, Corporation Counsel for the City of Chicago.

Defendants Palmer, Wells and Bowe filed an answer. Defendant Melaniphy filed a motion to strike, alleging that the City of Chicago was a necessary and indispensable party in the event the complaint was otherwise good. Plaintiff then filed an amended complaint adding the City of Chicago as an additional party-defendant.

On May 12, 1962, plaintiff was driving a motor vehicle on the streets of Chicago and was involved in a traffic accident. A police officer who was not a witness to the occurrence, handed plaintiff a summons and a traffic ticket charging plaintiff with violating a traffic ordinance of the City of Chicago, namely, of making an improper left turn. The City Ordinance carries a maximum fine of $250. Failure to pay a fine could result in imprisonment in the House of Correction worked out on the basis of $2.00 per day. A hearing was scheduled on this charge in the Municipal Court of Chicago before Judge Cwiklinski.

The motions of defendants to strike and dismiss the amended complaint were sustained by the District Court on November 29, 1962. The order stated that the amended complaint was "dismissed for lack of jurisdiction." The appeal now before us is from this judgment order.

The amended complaint expands the allegations of the original complaint, but the gist of the case is the same, *i.e.*, that prosecution of an ordinance with alleged criminal sanctions, under civil rules of procedure, violates federal due process of law. The amended complaint further challenges the constitutionality of the ordinance if it is enforced under civil rules.

[1] Judge Wells was elected Judge of the Superior Court of Cook County in November 1962, and his position as Supervising Judge of the Traffic Center of the Municipal Court of Chicago was assumed by Judge Casimir V. Cwiklinski who, by motion, was made a party-defendant herein.

We understand the substance of appellant's position to be: Prosecution for violation of a city ordinance which carries sanctions of criminal punishment is, in fact, a criminal prosecution and must be tried under criminal procedures. Appellant argues the principles of the presumption of innocence and the requirement of proof beyond a reasonable doubt, would be denied to him if he is tried under the city ordinance.

On May 12, 1962, and up to the present time, there was and is in full force and effect in the State of Illinois, a statute enacted prior to the city ordinance under which plaintiff is charged. The statute makes an improper left turn a misdemeanor. The maximum fine prescribed by statute for a first offense is a $100 fine which, for non-payment, subjects the offender to imprisonment which is satisfied at the rate of $5 per day.

It is well established in Illinois, as elsewhere, that all ordinance violation cases are tried as civil rather than criminal matters. *Village of Maywood* v. *Houston*, 10 Ill. 2d 117, 139 N. E. 2d 233. Also, that the Illinois Civil Practice Act governing the practice and procedure in civil cases, applies to ordinance prosecutions.

Plaintiff has not been tried under the ordinance charge. However, the amended complaint alleges a threatened and imminent prosecution which plaintiff asserts threatens him with the denial of due process of law. Plaintiff argues in his brief, "The threat to the plaintiff of a criminal prosecution under civil principles threatens his constitutional rights of due process, not only with respect to the ordinance with which he is presently charged, but under any ordinance with which he may be charged in the future, either a traffic or non-traffic ordinance."

Plaintiff does not cite any judicial precedent to justify his demand for a declaratory judgment and an injunction. In fact, he states this case is "sui generis"; that there is no case directly in point. However, plaintiff argues that the enumerated threatened deprivations of rights guaranteed under the Fourteenth Amendment are sufficient to confer jurisdiction on the District Court; that plaintiff

need not first exhaust state remedies, for Congress has given him a remedy under the federal Civil Rights Act (42 U. S. C. § 1983).

Plaintiff states that all defendants were sued in their official capacity, acting under color of office. Also, that "the judicial defendants were joined because their authority subjects the plaintiff to the most direct threat to his liberty."

Nowhere in his brief and argument does plaintiff claim he was not guilty of the traffic ordinance violation which is pending against him in the Municipal Court of Chicago. However, he does state "had he chosen to do so" he "could easily have gotten his case dismissed on one of several grounds."

In view of plaintiff's demand for injunctive relief, the provisions of 28 U. S. C. § 2283 should be borne in mind. This statute provides "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

United States District Courts are courts of limited jurisdiction. Under 28 U. S. C. § 2283, Congress has denied power or jurisdiction to district courts to grant an injunction to stay proceedings in a state court with only two exceptions. Here, the provisions of the statutes "in aid of its jurisdiction" are not applicable. We next discuss the provision "or to protect or effectuate its judgments."

It could be argued that if the district court has the jurisdiction and power to enter a declaratory judgment, it also has jurisdiction to issue an injunction "to protect or effectuate its judgments." We think the District Court does not have jurisdiction to enter a declaratory judgment as requested in the instant case. But, assuming that power under general rules of equity, a United States District Court will not enjoin state court criminal prose-

cutions or state court prosecutions for violations of municipal ordinances.

A recent decision on this point is *Cleary* v. *Bolger*, 371 U. S. 392 (1963). The Court said, page 397, "Courts of equity traditionally have refused, except in rare instances, to enjoin criminal prosecutions. This principle is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue." *Stefanelli* v. *Minard*, 342 U. S. 117, 120. It has been manifested in numerous decisions of this Court involving a State's enforcement of its criminal law. *E.g.*, *Pugach* v. *Dollinger*, 365 U. S. 458; *Douglas* v. *City of Jeannette*, 319 U. S. 157; *Watson* v. *Buck*, 313 U. S. 387; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45. The considerations that have prompted denial of federal injunctive relief affecting state prosecutions were epitomized in the *Stefanelli* case, in which this Court refused to sanction an injunction against state officials to prevent them from using in a state criminal trial evidence seized by state police in alleged violation of the Fourteenth Amendment: "To would expose every State criminal prosecution to unsupportable disruption. Every question of procedural due process of law, with its far-flung and undefined range, would invite a flanking movement against the system of State court law, resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, or the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which considerations counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." 342 U. S. at 123-124."

In our view, the statement of the Supreme Court in *Cleary* is sufficient to decide this case and to demonstrate that the District Court below should not have entered either a declaratory judgment or injunctive relief.

In *Cleary*, the Supreme Court cited *Douglas* v. *City of Jeannette*, 319 U. S. 157. It was there held that a federal district court should not enjoin, under the Civil Rights Act, an ordinance prosecution in a state court even though the ordinance involved had already been held unconstitutional by a federal court.

A pertinent statement by the Court in *Douglas* v. *City of Jeannette*, 319 U. S. at page 163 is: "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction. . . ."

Other defenses have been raised which we do not reach.

The order and judgment of the District Court dismissing the amended complaint is

AFFIRMED.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 14068

GEORGE WOJCIK, *Plaintiff-Appellant*

v.

BURTON PALMER, Trial Assistant,
Municipal Court of Chicago,
et al., *Defendants-Appellees*

JUDGMENT

June 13, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, affirmed with costs, in accordance with the opinion of this Court filed this day.

Filed and entered June 13, 1963.

APPENDIX D.

This Letter is Contained in the Record of the Municipal of Chicago, Transmitted Herewith.

John D. Casey
Attorney at Law
7 South Dearborn Street
Chicago 3

November 2, 1962

Hon. Casimir V. Cwiklinski
Municipal Court Traffic Center
321 North LaSalle Street
Chicago, Illinois

Re: City vs. George Wojcik
No. 144488
Set November 7, 1962

Dear Judge Cwiklinski:

The above mentioned traffic ordinance violation case is pending in your court and has been continued from time to time. The defendant Wojcik has filed suit in the Federal Court before Judge Will against Chief Justice Bowe, Judge Wells (whom I am defending) and others, and a motion to dismiss that suit is pending. The suit is of the ty(pical) nuisance type and we believe it will be dismissed.

To avoid any conflict between the courts, Chief Justice Bowe authorized me to inform Wojcik's attorney that the traffic case pending in your court would be continued until after Judge Will has disposed of the federal court case, and that is why Judge Wells has previously continued the hearing.

It is requested that the case be continued again on November 7th.

Yours very truly,
/s John D. Casey.

JDC:rm

Carbon copy to:
Hon. Augustine J. Bowe
City Hall
Chicago 3, Illinois

APPENDIX E

In The Municipal Court Of Chicago
Traffic Division

City of Chicago, *Plaintiff.*
v. No. W 144-188
George Wojcik, *Defendant.*

MOTION FOR CONTINUANCE
(Filed February 8, 1963)

Now comes the petitioner and defendant herein, George Wojcik, by his attorney, Harold Z. Kaplan, and states as follows:

1. The above-entitled traffic ticket charging the defendant with violation of Section 214 (b) of Chapter 27 of the Municipal Code of Chicago, arises out of an automobile accident April 12, 1962.

2. The petitioner did on July 3, 1962, file a complaint for declaratory judgment in the U. S. District Court for the Northern District of Illinois, Eastern Division, No. 62 C 1288, against the City of Chicago, Corporation Counsel of the City of Chicago, and judges and officials of this Court with respect to constitutional questions arising in connection with the prosecution of this ordinance as a civil rather than a criminal matter.

3. At all times during the pendency of the aforementioned action, this cause has been continued with the consent and acquiescence of the Chief Justice of this Court and a defendant in the aforementioned action, His Honor, Augustine Bowe.

4. On November 29, 1962, the aforementioned federal case was dismissed for lack of jurisdiction by His Honor, Judge Hubert Will.

5. A notice of appeal of the aforementioned dismissal was duly filed December 20, 1962, and this cause is now docketed as Case 14068 in the U. S. Court of Appeals for the Seventh Circuit.

6. Important rights with respect to the petitioner's standing in Court in the action on appeal may be jeopardized by a disposition of this matter prior to the rendering of the opinion of the U. S. Court of Appeals for the Seventh Circuit.

7. Your petitioner has raised substantial constitutional questions with respect to the law and procedures relating to the prosecution of ordinances in civil matters and is of the opinion that he will succeed in his appeal.

8. Under the Traffic Code of the City of Chicago, the maximum fine which may be imposed for the violation charged to the defendant herein is $200.00 and in order to secure this Court and the City of Chicago for any judgment which may be obtained therein, he stands ready and able to tender to this Court, as bond, such sum of money as the Court may require, up to $200.00.

9. The questions raised upon the defendant's appeal to the U. S. Court of Appeals raise serious constitutional questions affecting all ordinance prosecutions, which may be frustrated by a premature disposition of the traffic charge against this defendant.

Wherefore, the defendant, George Wojcik, through his attorney, Harold Z. Kaplan, prays that an order be entered continuing this cause until such time as an opinion has been handed down by the U. S. Court of Appeals for the Seventh Circuit.

/s/ Harold Z. Kaplan
Attorney for Defendant

ORDERS ENTERED

Record of Municipal Court of Chicago Transmitted

Motion of Defendant, filed February 8, 1963 continued by Order of Court to February 19, 1963.

February 19, 1963, Cause Continued to April 30, 1963.

April 30, 1963, Cause Continued to July 5, 1963.

July 5, 1963, Cause Continued to August 7, 1963.

August 7, 1963, Cause Continued to September 10, 1963.

APPENDIX F

The following excerpts are taken from the Prentice-Hall Practicing Attorney's Letter, Section 2, Supplement, dated July 3, 1963.

(Page 1)

The Legal Profession: What Lawyers and Laymen Think About It As Revealed By The Missouri Bar—Prep-Hall Public Attitudes Survey

The Most Searching Inquiry Ever Conducted Into What Lawyers And Laymen Think About The Legal Profession Has Just Been Completed. It reveals research data (both predictable and startling) which because of its scope and reliability will be of inestimable value not only to you, the practitioner, but also to those you serve. Undertaken 3 years ago, as a joint public service project of The Missouri Bar Association and The Prep-Hall Foundation, the survey reached a climax last month—with the publication of a comprehensive, 496-page account of this milestone in motivational research.

(Page 7)

Opinion about the Judicial System

Justice in court—A shocking lack of confidence exists among laymen about the possibility of obtaining a fair trial in court. More than 30% doubted they would have better than a 50-50 chance of obtaining a just verdict if accused of a crime.

Surprisingly, persons who have never used a lawyer have a better opinion of courts than persons who have. Similarly, those who have had the least opportunity to observe courts in action have the most confidence in them and the highest regard for judges, lawyers and juries.

A strong feeling exists that judges in some traffic courts are unfair, subject to outside influence, and lack common courtesy. This feeling diminishes in relation to higher courts.

(Page 8)

Recommendations (1) Lack of public confidence in the courts is a problem of utmost concern which must be given further serious study and attention by the Bar. Means of improving the quality of both judges and juries must be devised.

Excerpts from Sylvia Porter's syndicated column which appeared in the Chicago Daily News June 27, 1963, page 55, was headed:

Extensive Survey

AMERICANS' LACK CONFIDENCE IN THE LEGAL PROFESSION

Criticism of Lawyers, Courts Aimed at Spurring Remedies

By Sylvia Porter

"There's a shocking lack of confidence about the possibility of getting a fair trial in the court. Opinion of traffic courts is abysmally low. And the individual who has direct knowledge of the courts has less confidence in them than the person whose knowledge is restricted to TV, movies, newspapers and radio."

"These are some of the startling findings of the most comprehensive study ever made of any profession. The survey, initiated by the Missouri Bar three years ago, was conducted among over 5,000 individuals in the population-balanced state of Missouri.

"Financed by the Prentice-Hall Foundation, it was released Thursday by Prentice-Hall and will be the basis for a textbook."

"The bar association should put strong emphasis on improvement of jury trial and court procedures. Improvement of traffic courts should be a prime objective."

Remarks made to the press by Walter E. Craig, President of the American Bar Association, as reprinted in an article appearing in the Chicago Daily News, page 4, August 17, 1963.

The new president of the American Bar Assn. pledged Saturday to seek improvements in the administration of justice nationally in traffic and police courts.

"About 85 per cent of our citizens have direct contact with the so-called 'lower' courts," said attorney Walter E. Craig, Phoenix, Ariz., "and we must make those courts the finest in the nation."